IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

WEDNESDAY, THE 31ST JANUARY 2007 / 11TH MAGHA 1928

CRL.A.No. 1411 of 2005()

SC.997/2000 of ADDL.SESSIONS COURT-TRIAL OF ABKARI ACT CASES,NEYYATTINKARA
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APPELLANT: ACCUSED

SELVARAJ, S/O.CHELLAPPAN NADAR,
POOVAR NELLY VEEDU, ULATHANKARA DESOM,
CHENKAL VILLAGE, NEYYATTINKARA.

BY ADV. SRI.G.SUDHEER

RESPONDENTS: COMPLAINANT

STATE OF KERALA, REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY P.P.SRI. C.M. NAZAR

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 31/01/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

Crl.A.No.1411 OF 2005-A

Dated this the 31st day of January, 2007.

JUDGMENT

The appellant, accused, in S.C.No.997/2000 on the file of the Additional Sessions Judge for the trial of the Abkari Act Cases, Neyyanttinkara, faced trial for the offence punishable under Section 58 of the Abkari Act. The prosecution allegation against the appellant is that while PW3 was on patrol duty on 24.12.1998 along with his police party, received information that the appellant, who was trying to sell alcohol, has been retained by the people of the locality near Vlathankara ration shop and thereby PW3 and his officials reached the spot and the appellant was arrested with MO1 jerry can having ten liters capacity which contained ten liters of arrack without having any licence or authorisation under the provisions of the Abkari Act. To prove the above allegation, the prosecution examined PWs 1 to 6 and relied on Exts.P1 to P5. The prosecution also produced MO1 jerry can. On closing the prosecution evidence, the appellant was questioned under Section 313 of the Code of Criminal

Procedure. He denied the prosecution allegation and had stated that he is innocent. However, relying on the evidence adduced by the prosecution, both oral and documentary, the trial court found the appellant guilty under Section 58 of the Abkari Act and he was convicted thereunder and sentenced to undergo R.I for a period of three years and a fine of Rupees One lakh with default sentence of fine to a further period of R.I for six months. The above conviction and sentence are assailed in the appeal.

2. This Court heard the learned counsel appearing for the appellant - Sri. Sudheer and the learned Public Prosecutor. The counsel appearing for the appellant had taken three contentions before this Court to challenge the findings entered by the trial court. Firstly the learned counsel submitted that the trial court went wrong in placing reliance on the evidence of the official witnesses to find the appellant guilty as the independent witnesses cited and examined were not supporting the prosecution case at all. Secondly, the learned counsel submitted that the trial court had seriously erred in finding the appellant guilty of the offence on the basis

of the evidence adduced by Pws 2, 3 and 4 and also Ext.P3 as the evidence of these witnesses and the document would not prove that the appellant was found in possession of the contraband article from which the sample was taken for analysis. Lastly, the learned counsel submitted that PW3 had violated the provisions of Kerala Abkari Act and the provisions of the Excise Manuel while arresting and seizing the contraband article as alleged from the appellant because PW3 had not complied with the above provisions in sending the sample and also in taking the sample from the contraband article. To substantiate this contention, the learned counsel relied on the judgment of this Court reported in **Narayani v. Excise Inspector** (2002(3) KLT 725).

3. The prosecution case is that while PW3 and his officials were on patrol duty on 24.12.1998 received information that the appellant has been restrained by the people of the locality near Vlathankara ration shop and on getting informatio, PW3 and the other officials went to the spot and the appellant was found in possession of MO1 jerry can which contained ten liters of arrack. PW3 had given evidence before the court

that on reaching the spot the appellant was arrested and he was taken to the police station on preparing Ext.P1 seizure mahazar. MO1 jerry can was also seized from the appellant. To prove the seizure, prosecution examined two independent witnesses namely PW1 and PW5. Both of these witnesses turned hostile to the prosecution and they have even denied their signature in Ext.P1. The evidence left to corroborate with the evidence of PW3 is that of PW2, a Police Constable, who accompanied PW3 at the time of seizure. Though the prosecution had relied on the evidence of PW3 to prove the allegation against the appellant, it is not proper for the court to reject such evidence on any excuse if the evidence is otherwise be acceptable. The case in hand itself it is come out in evidence that PW3 had seized MO1 jerry can from the spot where the appellant was arrested as restrained by the local people. None of the local people, who alleged to have been participated in restraining the appellant, has been cited or examined to prove the allegation levelled against the appellant. The two witnesses examined were not supporting the prosecution also. That apart, when PW3 was examined in the court he had stated that the appellant was arrested from

the spot and the contraband article was seized and produced before the court. But he had no case before the court that he had taken any sample from MO1 jerry can in the presence of any of the witnesses including PW2. In this context, the evidence of PW2 is also relevant. PW2 had stated that he is not remembering whether PW3 had taken any sample from MO1 jerry can for forwarding the same for public analysis. He also had stated that he is not remembering whether the contraband article itself was labeled or sealed as per the provisions of the Abkari Act by PW3 in the presence of the appellant or the other witnesses. In this context, the evidence of PW4 is also relevant who is the thondi clerk attached to the Magistrate's Court. PW4 had stated before the court that he had taken sample from MO1 jerry can for the purpose of analysis and that too was after seven months of the alleged seizure. Though PW3 had stated in the cross examination that he had taken sample from the contraband article for analysis, the evidence of Pws 3 and 4 are contradictory in this context. In the above circumstance, the learned counsel brought to the notice of this Court that as per Ext.P4 thondi list no sample was produced before the

court along with the contraband article though it is stated that MO1 was produced before the court on 26.12.1998. Further Ext.P5 extract of the thondi list also does not show that any sample has been produced by PW3 as taken as per the provisions of the Abkari Act and the provisions of the Excise Manuel. As per Clause 34 of the Excise Manuel, it is mandatory on the part of the Excise Officials or the Police Officials to take two separate samples from the contraband article and to be sealed and labeled in the presence of the witnesses and the accused and that also be produced before the court. Apart from the above provision, Section 53 of the Abkari Act insists that any seizure is made on any contraband articles, it is imperative on the part of such officer that he shall take sample from them on affixing the seal and also the same shall be labeled for the purpose of chemical analysis. Apart from the above provision of the Abkari Act and the Excise Manuel, as per Rule 3 of the Kerala Chemico - Legal Examination Rules, 1959, it is specifically stated that in every case in which analysis is required for judicial purpose by the Police, Magistracy or Excise Officers, the Chemical Examiner shall as far as

practicable furnish a quantitative analysis stating the results of the analysis which led to the conclusion in his report under Section 293 of the Code of Criminal Procedure. This rule also contemplates that samples shall be taken by the officers, who seized the contraband article for the purpose of chemical analysis. In this context the judgment relied on by the learned counsel namely **Narayani's** case (cited supra) is relevant. In the above judgment this Court had specifically stated that it is the duty of the prosecution to prove that the residue and the sample were kept in proper custody till the date of producing the same before the court so as to rule out the chance of tampering with the sample taken and the residue seized. The evidence produced before the court would show that the contraband article as such as produced before the court on 26.12.1998 and the same was returned to the Police Constable for keeping the same for safe custody. But neither PW3 nor PW2 had given any evidence with regard to the keeping of the contraband article in proper custody till the sample was taken for analysis. As per the evidence of PW4 it is clear that the sample was taken by him only after the lapse of seven months of the seizure of MO1

jerry can. In the above circumstances, this Court is of the view that as the sample was not taken and analysed as per the provisions of the Abkari Act and the Kerala Excise Manuel, it creates doubt on the prosecution case itself. Hence, benefit of doubt shall be given to the appellant.

In the above circumstances, on the reasons stated above and on the findings entered, this Court is of the view that the judgment under appeal has to be set aside. Accordingly, the appeal is allowed. The judgment of the trial court is set aside and the appellant is acquitted. The appellant/accused in S.C.No.997/2000 on the file of the Additional Sessions Judge for the trial of the Abkari Act Cases, Neyyattinkara, shall be released forthwith, if he is not required to be kept in jail in connection with any other case.

K. THANKAPPAN, JUDGE.

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K. THANKAPPAN, J.

CRL.A.NO.1411 OOF 2005

JUDGMENT

31st January, 2007.